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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 181

ROBERT H. McNEILL

v.

COMMISSIONER OF INTERNAL REVENUE

MEMORANDUM IN REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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The Petition for Certiorari was filed on July 16, 1958. Thereafter, on August 15, 1958 the Brief for the Respondent in Opposition was filed. The instant Memorandum is now respectfully submitted by petitioner for reply to respondent's brief.

ARGUMENT

The fallacy of respondent's position in this proceeding is clearly demonstrated by an analysis of his brief in opposition. By patently ignoring and side stepping the fundamental issues raised by the petition

herein, respondent in effect concedes his inability to answer them effectively.

1. It is the position of petitioner that the following facts found by the Tax Court can properly support no conclusion other than that the property was held by him primarily for the sale to customers.

* * * * * * * * *

"He desired to sell the lots to the public either at auction or through separate sales transactions. Petitioner engaged experienced engineers to survey the property and prepare plats of the land to be offered for sale.

At a cost of $3,000, McNeill built a road through the forest to the top of the plateau where the lots held for sale were located.

Petitioner repeatedly advertised for the sale of the lots. He employed a prominent realtor in the community to solicit sales of the property, and made extensive efforts over a period of several years to sell the lots. All such efforts were completely unsuccessful.

Attempts were made to construct an airport project within the area, and also to interest the State of Pennsylvania in developing a public park on the land, but without success. Petitioner's expenses in connection with his attempt to develop an airport on the land amounted to $2,500.

In 1940 the Commissioners of Blair County, Pennsylvania, seized 458 acres of the property in question because of nonpayment of realty taxes and retained title thereto for 2½ years, attempting meanwhile to sell it to a private owner after failing to dispose of the property to a public bidder for an amount equal to the unpaid taxes. During 1942 the property was conveyed by the County Commissioners to the City of Altoona, Pennsylvania. *After the acquisition of 458 acres of the*

Wopsononock tract by Blair County, and later by the City of Altoona, petitioner continued his efforts to sell all or part of the land since he retained a right of redemption therein." (App. 2a, 3a) (Emphasis Added)

* * * * * * * * *

"Moreover, his conduct in further attempting to sell the land after its seizure by Blair County and in offering to satisfy the mortgage outstanding against the property in May 1946 demonstrates his intention to retain control over it. Such conduct is clearly inconsistent with abandonment." (App. 6a)

* * * * * * * * *

To thereafter conclude that the property was not held primarily for sale is a non-sequitur, clearly erroneous and contrary to fundamental logic.

Respondent's primary argument is that the question here involved is one of fact and that the lower courts' appraisal of the particular facts afford no basis for establishing conflict with other courts of appeal or the Tax Court.

Respondent has not and, in fact, cannot reconcile the rationale of the courts below in the instant proceeding with *Albert Kruse*, (1957) 29 T.C. 463; *Walter G. Morley*, (1947) 8 T.C. 904; *Carter-Colton Cigar Co.*, (1947) 9 T.C. 219; *Solomon Wright, Jr.*, (1947) 9 T.C. 173, and *Julius Goodman*, (1939) 40 BTA 22, all supporting the view that the character bestowed upon real property at the time of its acquisition is thereafter retained unless subsequently changed by significant actions. Surely respondent does not here consider as controlling the fact that petitioner at age seventy (70), which he was during the years involved, was not as physically active as he had been as a young

man nearly a quarter of a century before when he originally acquired the property.

To argue as respondent does he not only must ignore the facts found by the court below but must also of necessity utterly disregard the fundamental principles so thoroughly established by the many cases cited by petitioner.

Petitioner respectfully submits that respondent has done nothing more than rely on broad generalities that are not here applicable. The inescapable fact is that here the courts below are wrong and this Court should not permit the overworked cliche that issues of this type are mere questions of fact to be used in such manner as to insulate an erroneous determination from review.

2. The courts below have definitely disregarded the uncontradicted testimony of an unimpeached witness. This simple fact is inescapable despite respondent's statement to the contrary.

Petitioner testified that the real estate owned by him was primarily for sale to customers during the years involved (App. 25a). There were absolutely no facts or even the slightest scintilla of evidence to the contrary. This testimony was entirely disregarded, however, and the Tax Court concluded that the properties were not held primarily for sale.

The primary purpose or intent for which a person holds real estate or any other asset is subjective and best known to that individual for the simple reason that a court cannot look into a person's mind. Petitioner's testimony as to his intentions with respect to the property here involved was neither inherently improbable nor contrary to any proven facts of record. Under these circumstances it cannot be disregarded. *Pennsylvania RR Co.* v. *Chamberlain,* (1933) 288 US

333; *Foran* v. *Commissioner,* (CA 5 1948) 165 F. 2d 705; *Wener* v. *Commissioner,* (CA 9, 1957) 242 F. 2d 938.

Nor should this Court overlook the fact that the Tax Court's determination, which the Court of Appeals considered binding upon it that the property here involved was not held primarily for sale to customers was no more than dictum on the part of the trial court for the reason that such a determination was unnecessary to its disposition of the issue before it.

CONCLUSION

Respondent attaches undue significance to the fact that each of the courts below concluded that the property here involved was not held primarily for sale to customers. Petitioner respectfully suggests that to urge denial of the petition for a writ of certiorari on this basis is merely to ask this Court to compound the errors committed below.

Nor is respondent's footnote reference to Section 1237 of the Internal Revenue Code of 1954 pertinent. In the first place, this section pertains to transactions of a different character than here involved; secondly, this particular section was enacted many years following the years here involved and it is therefore not pertinent and, third, and most important, even if the hypothesis of the respondent be correct the rights of the instant petitioner are those to be considered, and they should not be sacrificed merely because of a subse- they should not be sacrificed because of any non-applicable change in the law and its imaginary effect on future taxpayers.

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